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No. 09-1343

IN THE
Supreme Court of the United States

J. McINTYRE MACHINERY, LTD.,

Petitioner,

v.

ROBERT NICASTRO, *et ux.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a foreign manufacturer that places a defective product in the stream-of-commerce through a distribution scheme that targets a national market, including New Jersey, may be subject to *in personam* jurisdiction of a New Jersey court in a products liability action when its product causes injury in that State.

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PRELIMINARY STATEMENT

Before it sought review in this Court, Petitioner, J. McIntyre Machinery, Ltd. (hereinafter "J. McIntyre"), filed liquidation proceedings the equivalent of bankruptcy in the United Kingdom. Although there is no automatic stay of litigation in Great Britain when a company enters liquidation, J. McIntyre has insufficient funds to satisfy any potential judgment. J. McIntyre has sold off all of its assets and is no longer a viable company. Therefore, this litigation may become moot. Moreover, Petitioner's insurer, Hampden Insurance NV, is also insolvent and is in a run-off. *See* letter from Petitioner's counsel, attached as Appendix A hereto. Therefore, due to the bankruptcy of the Petitioner, and the insolvency of its insurer, this case is a poor vehicle to explore the question presented.

In its brief, Petitioner advances two flawed arguments on the merits. First, it argues that the New Jersey Supreme Court has made a "sweeping departure from this Court's due process jurisprudence" with its decision. Second, it argues that the New Jersey Supreme Court has created a "new stream-of-commerce theory," described by the Petitioner as "an unqualified and unexplained notion: the single 'global marketplace.'" Petitioner's Brief at pages 2 and 7.

Contrary to these arguments, the New Jersey Supreme Court has simply re-affirmed the existing stream-of-commerce theory as set forth in the New Jersey case of *Charles Gendler & Co. v. Telecom Equipment Corp.*, 102 N.J. 460, 508 A.2d 1127 (1986), and the United States Supreme Court case of *Asahi*

Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (plurality opinion of Justice O'Connor). Under the facts of this case, there is personal jurisdiction over the Petitioner under any existing theory of stream-of-commerce jurisdiction. Therefore, this case does not implicate any division of authority, because jurisdiction would be proper under any existing approach; the question presented is purely academic.

Apart from the soundness of the decision below and the absence of any conflict on an important issue of law, certiorari is not warranted because the case is in an interlocutory posture. The New Jersey Supreme Court held that the trial court erred in dismissing the Complaint and remanded the case for proceedings on the merits. Should J. McIntyre prevail on the merits, the question it now seeks to present will become academic. Should Respondents prevail on the merits, J. McIntyre will be able to present those issues to this Court following entry of a final judgment. This Court ordinarily awaits the entry of final judgment in a State Court action before granting review, and there is no reason to depart from that sound procedure in this case.

INTRODUCTION

Petitioner's arguments have no merit. Both the New Jersey Supreme Court and the United States Supreme Court have embraced the stream-of-commerce theory in one form or another for the last thirty (30) years. In *Robert Nicastro, et al. v. McIntyre Machinery America, Ltd., et al.*, 201 N.J. 48 (2010), the New Jersey Supreme Court simply found that the factual record easily supports the exercise of jurisdiction over J. McIntyre under the stream-of-commerce doctrine, as articulated in *Charles Gendler* and *Asahi*, due to the deliberate creation by a foreign manufacturer of a nationwide distribution strategy, by use of an exclusive American distributor, for selling its products to citizens throughout all states, including New Jersey.

The New Jersey Supreme Court noted that J. McIntyre, a company incorporated in the United Kingdom, "targeted the United States market for the sale of its recycling products." *Nicastro*, 201 N.J. at 78. It did so by forming McIntyre Machinery America, Ltd. (hereinafter "MMA"), an Ohio-based company, to be its exclusive United States agent and distributor for approximately seven (7) years, ending in 2001 with MMA's bankruptcy and dissolution. J. McIntyre knew or reasonably should have known that the distribution system it created and directed extended to the *entire* United States. For years, J. McIntyre employees and officers, together with MMA employees and officers, attended scrap metal trade shows and national conventions in various large American cities, where its products were advertised and offered for sale to citizens of all states. In fact, J. McIntyre and MMA used the

same booth at the Las Vegas trade convention where plaintiff's employer first saw the McIntyre Model 640 Shear, which, due to its defective design, eventually severed four (4) of plaintiff's fingers. *Nicastro*, 201 N.J. at 55. As concluded by the New Jersey Supreme Court, J. McIntyre:

> knew or reasonably should have known that its machines were being sold in states other than Ohio and in cities other than where the trade conventions were held. J. McIntyre may not have known the precise destination of a purchased machine, but it clearly knew or should have known that the products were intended for sale and distribution to customers located anywhere in the United States.

Nicastro, 201 N.J. at 78-79.

J. McIntyre purposefully availed itself of the entire American market, including New Jersey, by the creation, control and direction of an exclusive American distributor, and by appearing with regularity at national trade shows and conventions, for the purpose of marketing its products throughout the entire United States.

Additionally, since J. McIntyre employees and officers had no difficulty traveling throughout the United States to attend these trade shows and sell its products, they cannot be heard to complain that it would be a violation of traditional notions of fair play and substantial justice for it to be subject to the jurisdiction

of New Jersey courts. *Nicastro*, 201 N.J. at 76. To allow a different result would be to provide a road map to all foreign corporations to shield themselves from liability by hiring an exclusive American distributor, and requiring any plaintiffs injured by its products in the United States to travel to that American distributor's state in order to maintain an action against it, no matter what hardship is created by such a draconian rule.

Contrary to the arguments of the Petitioner in its brief, in *Nicastro*, the New Jersey Supreme Court simply re-affirmed its prior decision in *Charles Gendler*, *supra*, and meticulously articulated how its decision was in strict conformity with the prevailing law throughout the United States regarding foreign manufacturers, including the decision of the United States Supreme Court in *Asahi*, *supra*. The New Jersey Supreme Court carefully integrated the existing stream-of-commerce "plus" doctrine into the reality of today's current global marketplace, and did not create a "new test" or standard for *in personam* jurisdiction.

Rather, the New Jersey Supreme Court specifically held that its decision was indistinguishable from Justice O'Connor's stream-of-commerce plus theory in *Asahi*, also espoused in *Charles Gendler*, to the effect that:

> a manufacturer that knows or reasonably should know that its products are distributed through a nationwide distribution scheme that might lead to those products being sold in any of the 50 states must expect that it will be

> subject to this state's jurisdiction if one of its defective products is sold to a New Jersey consumer, causing injury.

Nicastro, 201 N.J. at 76-77.

The New Jersey Supreme Court noted: "The focus is not on the manufacturer's control of the distribution scheme, but rather on the manufacturer's knowledge of the distribution scheme through which it is receiving economic benefits in each state where its products are sold." *Nicastro*, 201 N.J. at 77.

In other words, by placing its product into the stream the commerce, **plus** creating and managing a nationwide distribution scheme intending for its products to be distributed throughout the United States, **plus** attending national trade shows where consumers from all over the country can see their goods, **plus** providing post-sale service to customers in the United States, **plus** advertising in national trade magazines, the foreign manufacturer has triggered personal jurisdiction in any state in which its product causes injury.

STATEMENT OF FACTS

In April 2009, Petitioner filed for liquidation (the equivalent of bankruptcy) in Great Britain. Although the Respondents have filed a Proof of Claim, the chances of a full recovery are slim, due to the allegation by Petitioner's counsel that Petitioner's insurance carrier, who has directed this litigation for nearly seven years and continues to direct it, is also in a "run-off" or

liquidation, and perhaps insolvent. *See* Letter from Petitioner's Counsel, attached hereto as Appendix A. Although there is no equivalent of an "automatic stay" of litigation following the filing of liquidation proceedings in Great Britain, this case may be financially moot, and therefore a poor vehicle for certiorari on the issue of personal jurisdiction.

On October 11, 2001, plaintiff, Robert Nicastro, a resident of New Jersey, suffered catastrophic injuries while working on a metal shearing machine known as an "alligator shear", designed and manufactured by J. McIntyre to cut scrap metal into smaller pieces, at his employer's business location in Saddle Brook, New Jersey. Mr. Nicastro's injuries include amputations and attempted re-attachment of all four fingers on the right hand of this working man. Mr. Nicastro had multiple surgeries to repair his mangled hand, and has been on and off disability since the date of the accident. His employer's New Jersey-based worker's compensation insurance has paid nearly one-half million dollars in medical and other benefits.

Plaintiff's liability expert, Dr. Wayne Nolte, P.E., thoroughly inspected the shearing machine in question. Dr. Nolte opined that the shearing machine was a dangerous and defective product, which did not comply with ANSI industry and OSHA standards applicable in New Jersey or elsewhere in the United States for such equipment.

J. McIntyre filed a motion to dismiss the Complaint against it, contending that the Superior Court of New Jersey did not have personal jurisdiction over it. Mr.

Nicastro argued that the Court *did* have specific personal jurisdiction over J. McIntyre, due to its "minimum contacts" with New Jersey by virtue of its purposeful availment of the United States market, including New Jersey, evidenced by its shipment of goods there, its holding of US patents, its repeated participation in national trade shows throughout the United States, and its marketing strategy of using an exclusive American agent and distributor, MMA (which was bankrupt and dissolved prior to Mr. Nicasto's injury), to ship its products throughout the United States, including New Jersey.

Defendant J. McIntyre was based in Nottingham, England. The president of Mr. Nicastro's employer, Frank Curcio, ordered the J. McIntyre-built machine after seeing it at a trade show he attended in Las Vegas, Nevada. J. McIntyre designed and custom built the machine in England, and shipped the completed three-ton machine to its exclusive American distributor and admitted agent, MMA (formerly of Ohio, and now dissolved through bankruptcy). MMA, in turn, shipped the machine to plaintiff's employer, Curcio Scrap Metal, in Saddle Brook, New Jersey.

This is not a case of merely one component part being sold outside of the United States, and then used in a larger product manufactured outside of the United States, which then randomly found its way into the United States and eventually New Jersey, unknown to its manufacturer, as was the case in *Asahi*, *supra*. Nor is this a case of a used machine, manufactured overseas, that was sold on the secondary market in the United States, or purchased at auction, unknown to its

manufacturer. This large machine, weighing in excess of three (3) tons, did not arrive in New Jersey by accident, but by deliberate marketing and sales design of J. McIntyre, including personal attendance by senior management at national trade shows intended to attract customers from throughout the USA, including New Jersey.

Jurisdictional discovery in this case revealed that J. McIntyre directed MMA's marketing plan, shared booths with MMA at national trade shows in various American cities, sent its employees to America to repair its machines, and even included MMA on J. McIntyre's liability insurance. Discovery also revealed that Michael Pownall, President of J. McIntyre, attended both the 1994 and 1995 trade shows in Las Vegas, which is where Nicastro's employer saw the machine he purchased.

Mr. Curcio, Nicastro's employer, certified that if the machine needed a replacement part, he would have contacted the manufacturer in England. Indeed, J. McIntyre's pre-liquidation website stated that "we supply equipment worldwide from our base in Nottingham, England," and encouraged customers to call England for spare parts and service.

The documentation which accompanied the machine was printed in England, but references USA standards, in addition to UK standards. Therefore, it is obvious that J. McIntyre was directing sales and intending to sell its products specifically to United States customers. Interestingly, it appears as though J. McIntyre not only structured MMA's advertising and sales efforts in the United States, but also covered MMA under its liability

insurance policy until at least January 1, 2000. It appears that a J. McIntyre employee named David was in America to do on-site repairs to machines for United States customers. Discovery has also revealed that J. McIntyre considered MMA "partners" or at the very least its "agent" in the United States. A fax dated November 23, 1999, from Michael Pownall of J. McIntyre to MMA stated: "All we wish to do is sell our products in the United States – and get paid! If this isn't possible then the only other option open to us is for us to split up in an amicable fashion as quickly as we can." Another faxed letter, dated January 13, 1999, from Sally Johnson of J. McIntyre to Mary Gaither of MMA, states: "I have spoken to the Boss regarding your last email, and we both agree that it is time he and I came over to visit you to see how we can get things back on an even keel and move the business forwards [sic]." Another letter from Sally Johnson to Mary Gaither of MMA, also dated January 13, 1999, states: "sales in the States will start to come in, as they have from the rest of the world, and that McIntyre Machinery America can take over the after-sales support, commissioning, service, etc. . . ." In other words, J. McIntyre was an active partner in MMA, controlling sales, service and support.

Additionally, two articles which appeared in a trade publication called *Recycling Today*, one in May 2002 and one on October 10, 2003, discuss J. McIntyre's sales efforts being directed towards the United States market. The article in May 2002 contains statements from Sally Johnson, J. McIntyre's managing director, including: "McIntyre shears are well established in America," "Recycling Equipment Corp. (REC), Souderton, Pa., [is] the exclusive North American

distributor of its complete line of metal cleaning shears," and "we sold a shear straight off the stand at an American exhibition." May 2002, *Recycling Today* Article. Clearly, when its exclusive distributor was in Souderton, Pennsylvania, less than an hour from the New Jersey border, defendant J. McIntyre should have and would have expected that its product may be purchased and utilized in nearby New Jersey.

Plaintiffs also hired an investigator to find other scrap metal dealers in New Jersey who own a machine manufactured by J. McIntyre. According to Bob Alexander of Strip-Tec, J. McIntyre's 2003 exclusive dealer in the United States, at least **four** scrap metal companies in New Jersey have J. McIntyre machines: Raff Recycling in Cape May Court House, Max Weinstein Scrap Metals in Union, Cinelli Scrap Metal in Hackensack, and Curcio Scrap Metal in Saddlebrook (Nicastro's employer). Thus, J. McIntyre actively sought buyers in the state of New Jersey, through their exclusive U.S. dealer, and via their website. *See also* J. McIntyre's October 10, 2003 article in *Recyling Today*, encouraging "North American buyers" to purchase and register their machines to "allow McIntyre and Strip-Tec to offer full support" for their products. Not only does J. McIntyre have minimum contacts with the state of New Jersey, due to selling their machines through their exclusive distributor to four New Jersey customers, and having an exclusive agent at one time in nearby Souderton, Pennsylvania, but they purposefully availed themselves of the United States market, which includes New Jersey.

In short, J. McIntyre directed its products to be marketed and sold throughout the United States, and yet claims immunity from suit almost anywhere, including New Jersey, due to its strategy of using a thinly-veiled, financially- irresponsible distributor (the bankrupt and dissolved MMA), with a nearly identical name, whose marketing and sales were directed by J. McIntyre, and who was also included in J. McIntyre's liability insurance.

J. McIntyre is a menace to American workers, such as Mr. Nicastro, due to its dangerous and defective product, which it deliberately caused to be marketed and distributed throughout the United States with impunity. J. McIntyre is everywhere when it comes to sales, and nowhere when it comes to liability, due to its disingenuous "independent distributor" strategy, while it not only firmly controlled MMA, it even provided insurance coverage to MMA. This liability-evasion technique is just the sort of activity that stream-of-commerce-plus personal jurisdiction seeks to prevent.

REASONS FOR DENYING THE PETITION

1. THIS CASE IS A POOR VEHICLE TO EXPLORE THE QUESTION PRESENTED BECAUSE THE PETITIONER IS IN LIQUIDATION AND THE CASE MAY BECOME MOOT.

In or about April 2009 the Petitioner, J. McIntyre filed "liquidation" proceedings in Great Britain, which is the equivalent of bankruptcy in the United States. Furthermore, Petitioner's insurer, Hampden Insurance N.V. is also apparently insolvent and is in "run-off."

See letter from Petitioner's counsel dated March 2, 2010, attached as Appendix A. As a consequence, for all practical purposes, this case is or may become moot, due to the absence of any funds to satisfy the Respondent, or to continue with this litigation. Under these circumstances, the case is simply not worthy of Supreme Court review, as it may not constitute an actual, ongoing "case or controversy" as required by the United States Constitution, Article III, Section 2, Clause 1. *Ivy Club v. Edwards*, 943 F. 2d 270, 275 (3d Cir. 1991), *rehearing denied, cert. denied, DelTufo v. Ivy Club*, 503 U.S. 914 (1992).

2. THE INTERLOCUTORY POSTURE OF THIS CASE REQUIRES THAT REVIEW BE DENIED.

In light of Petitioner's bankruptcy and the limitations on this Court's jurisdiction to review non-final state-court judgments, the interlocutory nature of the ruling below also offers a compelling reason to deny review. The New Jersey Supreme Court remanded this case to the Law Division (trial court) for proceedings on the merits. Should J. McIntyre prevail on the merits, the issue of personal jurisdiction will become academic. Should the Respondent prevail on the merits, J. McIntyre will have an opportunity at that time to present the issues of personal jurisdiction to this Court, following entry of a final judgment. This Court ordinarily awaits the entry of final judgment before granting review, *Bhd. Of Locomotive Firemen and Enginemen v. Bangor & Aroostook RR*, 389 U.S. 327, 328 (1967), and there is no reason to depart from

3. THE NEW JERSEY SUPREME COURT DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS

In *Asahi*, Justice O'Connor, writing for four members of the Court, construed the facts of that case under a test that has become known as stream-of-commerce plus. 108-13, 107 S. Ct. at 1030-32 (plurality opinion). Under that test, the actions of a defendant must be "purposefully directed toward the forum State" for a Court of that State to exercise personal jurisdiction. As noted by the *Nicastro* Court, according to Justice O'Connor, the stream-of-commerce plus test requires that the defendant engage in "additional conduct . . . indicat[ing] an intent or purpose to serve the market in the forum State." *Ibid.* That "additional conduct" could be "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or **marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.**" *Id.* at 68 (emphasis added). Justice Brennan espoused a less vigorous view of the stream-of-commerce doctrine, and saw no need for plaintiff to present "additional conduct" to establish that the defendant's acts were "purposefully directed toward the forum State." *Id.* at 69.

Even under Justice O'Connor's more restrictive view of "additional conduct" required in her stream-of-commerce plus approach, the New Jersey Supreme Court in *Nicastro* held that J. McIntyre satisfied the stream-of-commerce plus doctrine, by virtue of its

targeting of the national market through a nationwide distribution scheme, inclusive of New Jersey. The New Jersey Appellate Division opinion in *Nicastro v. McIntyre Machinery America, Ltd.*, 399 N.J. Super 539, 45 A2d 92 (App. Div. 2008), quoted approvingly by the New Jersey Supreme Court, concluded that J. McIntyre's "conduct in establishing and operating under this exclusive distributorship arrangement constituted the necessary other conduct by which it purposefully availed itself of the benefits and protections of all fifty states, including New Jersey." *Nicastro*, 201 N.J. at 74.

As set forth in *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (6th Cir.), *cert. denied*, 510 U.S. 914 (1993) and *A. Uberti & Co. v. Leonardo*,181 Ariz. 565, 892 P.2d 1354 (Ariz.) *cert. denied*, 516 U.S. 906 (1995), a manufacturer that knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the 50 states, must expect that it will be subject to any state's jurisdiction if one of its defective products caused injury.

The New Jersey Supreme Court further noted:

> The focus is not on the manufacturer's control of the distribution scheme, but rather on the manufacturer's knowledge of the distribution scheme through which it is receiving economic benefits in each state where its products are sold. A manufacturer cannot shield itself merely by employing an independent

> distributor a middle man knowing the predictable route the product will take to market.

Nicastro, 201 N.J. at 77 [citations omitted].

The decision of the New Jersey Supreme Court in *Nicastro* merely comports with both long-standing New Jersey Supreme Court and United States Supreme Court opinions on this subject, specifically, *Charles Gendler* and *Asahi*.

In short, the facts of this case would satisfy personal jurisdiction under any prevailing theory and does not implicate any conflict requiring review by this Court.

4. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IS NOT VIOLATED BY THE STREAM OF COMMERCE THEORY

In *Nicastro*, the New Jersey Supreme Court held that "a foreign manufacturer that places a defective product in the stream-of-commerce through a distribution scheme that targets a national market, which includes New Jersey, may be subject to *in personam* jurisdiction of a New Jersey Court in a product liability action." 201 N.J. at 73.

The New Jersey Supreme Court noted that the United States Supreme Court in *Asahi* "embraced the stream-of-commerce theory in one form or another". *Nicastro*, 201 N.J. at 72. It further noted that in *Asahi*,

neither Justice O'Connor nor Justice Brennan "intended that a foreign manufacturer seeking to capture a national market through a nationwide distribution scheme would be immune from suit in every state." To the contrary, by virtue of targeting the entire United States as its potential market, the foreign manufacturer cannot claim immunity when one of its products causes damage or injury in any given state.

As set forth in *Charles Gendler*:

> In today's complex business world foreign manufacturers rarely deliver products directly to consumers in the United States. [Citation omitted.] Instead, these manufacturers employ middle men, many of whom are often independent, to act as their distribution arms. To allow a foreign manufacturer to shield itself from liability for damages caused by its products distributed by those middlemen would be to permit "a legal technicality to subvert justice and economic reality in the worse sense." [Citation omitted.] Foreign manufacturers should not be allowed to insulate themselves by using intermediaries in a chain of distribution or by professing ignorance of the ultimate destination of their products. [Citations omitted.] Thus, the stream-of-commerce theory supports personal jurisdiction over foreign manufacturers that derived benefits from the distribution and sale of their products in the United States.

* * *

> We believe, however, that a manufacturer need not so control the distribution system to place its products into the stream of commerce and, therefore, control of that system is not necessary to subject the manufacturer to the jurisdiction of the forum state. [Citation omitted.] The focus is on the manufacturer's actual or constructive awareness of the system, not on control of the distribution of its products.
>
> * * *
>
> Accordingly, a manufacturer that knows its products are distributed through a nationwide distribution system should reasonably expect that those products would be sold throughout the fifty states and that it will be subject to the jurisdiction of every state.

102 N.J. at 479-481.

The "minimum contacts" necessary to satisfy the Due Process Clause of the Fourteenth Amendment is triggered by a nationwide distribution system which targets customers in every state. As stated in *Nicastro*:

> The preeminent issue is whether we will read the Due Process Clause in a way that renders a state, such as New Jersey, powerless to provide relief to a resident who suffers serious injuries from a product that was sold and marketed by a manufacturer,

> through an independent distributor, knowing that the final destination might be a New Jersey consumer.

201 N.J. at 74-75.

In this case, the British manufacturer of this large industrial product deliberately created a national marketing and distribution scheme throughout the United States, with the intent to sell its products in all fifty states, including New Jersey, with devastating consequences for Mr. Nicastro.

The *Nicastro* court quoted from the United States Supreme Court decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 105 S.Ct. 2174, 2182, 85 L.Ed. 2d 528, 541 (1985), in noting that every state has a strong interest in protecting its citizens:

> A state has a strong interest in protecting its citizens from defective products, whether those products are toys that endanger children, tainted pharmaceutical drugs that harm patients, or work place machinery that causes disabling injuries to employees. A state also has a paramount interest in insuring a forum for its injured citizens who have suffered catastrophic injuries due to allegedly defective products in the workplace. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 105 S.Ct. 2174, 2182, 85 L.Ed. 2d 528, 541 (1985) ("A State generally has a manifest interest in providing its residents with a convenient forum for redressing injuries

> inflicted by out-of-state actors." (citation and internal quotation marks omitted.)) *See also Charles Gendler, supra*, 102 N.J. at 43, 508 A.2d 1127 ("A State's interest in providing a forum for its residents is more compelling in a personal injury action than in commercial litigation.")

Nicastro, 201 N.J. at 75.

In *Nicastro*, the New Jersey Supreme Court noted that it was simply re-affirming its holding in *Charles Gendler*, to the extent that "a forum manufacturer will be subject to this State's jurisdiction if it knows or reasonably should know that through its distribution scheme its products are being sold in New Jersey." *Nicastro*, 201 N.J. at 73 and 77. The holding in *Nicastro* is also in strict conformity with Justice O'Connor's plurality opinion in *Asahi*, which listed, among other indicia of minimum contacts, "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State," the exact situation here, wherein MMA was the exclusive distributor who agreed to serve as J. McIntyre's US agent for all 50 states, including New Jersey, an "independent agent" which was nonetheless under the frequent and direct control of J. McIntyre. *Nicastro*, 201 N.J. at 76-77.

5. DEFENDING A PRODUCT LIABILITY ACTION IN NEW JERSEY WOULD NOT OFFEND TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE

The New Jersey Supreme Court in *Nicastro* noted in detail that J. McIntyre, "cannot make out a case that travel to New Jersey is onerous or an unfair burden for it to bear."

> J. McIntyre's officials have visited various cities throughout the United States to promote its business interests, attending trade conventions and meeting with representatives of its exclusive distributor. Certainly, defending the product liability action in Ohio, where J. McIntyre's now-defunct exclusive distributor conducted business, or in Nevada, the site of the 1994 and 1995 trade conventions, would be no more convenient than in New Jersey. Indeed, New Jersey is a shorter distance from England than those locales, and neither the Ohio nor Nevada Courts would seem to have an interest in resolving a product-liability action in which an English manufacturer's product injured a New Jersey resident in New Jersey.

Nicastro, 201 N.J. at 79-80.

Furthermore, defending a suit in one of the United States is not as burdensome as it once might have been, given that air transport can bring the principals of a business here within hours and instantaneous

communication allows an ongoing dialogue with counsel in this country.

> If it is not inconvenient for the principals of a company to attend trade conventions and conduct business meetings with an independent distributor in this country for the purpose of marketing its products, then it should not be too great a burden to defend a lawsuit here when one of its defective products causes serious bodily injury.

Nicastro, 201 N.J. at 76.

On the other hand, New Jersey has a strong interest in exercising jurisdiction:

> Plaintiff is a New Jersey resident; the allegedly defective product was purchased by a New Jersey consumer, plaintiff's employer; the injury occurred in a New Jersey workplace; plaintiff was treated for his injuries in the New Jersey regional area; the evidence the shear machine and most of the necessary witnesses, are located in New Jersey; and last, the law of this State likely will govern the action.

Nicastro, 201 N.J. at 80.

As concluded by the New Jersey Supreme Court:

> It would be unreasonable to expect that plaintiff's only forum of relief is to be found

> in the Courts of the United Kingdom, which may not have the same protections provided by this State's product-liability law. Under all the circumstances, New Jersey has a rightful claim to resolve the dispute between the parties and to assert jurisdiction over this product liability action.

Nicastro, 201 N.J. at 80.

In sum, the foreign manufacturer has deliberately visited the United States for marketing purposes at national conventions throughout the country, seeking customers from every state and actively promoting its machines for sale all over the country, and selling it through an exclusive distributor, and should not be heard to complain that it represents an unreasonable or disproportionate burden to litigate a case of catastrophic personal injuries in New Jersey, contrary to "traditional notions of fair play and substantial justice."

The hypothetical example given by Petitioner's counsel regarding a lone candlemaker in Alaska selling a candle through a Seattle gift shop to a New Jersey tourist is utterly inapposite to the case at bar. If the hypothetical candlemaker attended national candle-making trade shows throughout the United States, seeking customers from all 50 states, manufactured candles for industrial purposes, but with dangerous defects such as exploding wax, and hired an "independent" exclusive US distributor, but controlled the distributor's nationwide marketing and sales, provided liability insurance to the distributor, and

boasted of its sales throughout the United States, the candlemaker example would be closer to the reality of this case.

CONCLUSION

For all of the foregoing reasons, the opinion of the New Jersey Supreme Court in *Nicastro* simply reaffirms the existing stream-of-commerce theory, which has been in place for over twenty years in New Jersey under *Charles Gendler*, and set forth in the United States Supreme Court case of *Asahi*, and therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

APPENDIX

APPENDIX LETTER TO ALEXANDER W. ROSS, JR. FROM STEVEN F. GOOBY DATED MARCH 2, 2010

ANSA | ASSUNCAO LLP

March 2, 2010

VIA UPS OVERNIGHT DELIVERY

Alexander W. Ross, Jr., Esq.
Rakoski & Ross, P.C.
76 East Main Street
Marlton, New Jersey 08053

Re: *Nicastro v. McIntyre Machinery America, Ltd.*

Dear Mr. Ross:

Enclosed is a copy of correspondence received by my former co-counsel, DLA Piper (UK) LLP, from RSM Tenon Recovery in Nottingham, England concerning J. McIntyre Machinery Ltd.'s ("JMM") liquidation proceedings in the United Kingdom. Included with the Joint Liquidator's correspondence is a copy of a "proof of debt" form. Please be guided accordingly.

We are also advised that JMM's insurer, Hampden Insurance N.V., is insolvent and is in run-off. Enclosed is a copy of the insurer's most recent annual report for your reference. We are further advised that as of December 31, 2009, Hampden closed its London office and its only remaining office is located in Rotterdam.

Please contact me at your convenience to discuss.

Very truly yours,

s/ Steven F. Gooby